

*Courts of Justice Act*

IN THE MATTER OF a Complaint(s) respecting  
JUSTICE OF THE PEACE Errol Massiah  
Justice of the Peace in the  
Central East Region

**NOTICE OF CONSTITUTIONAL QUESTION**

The Applicant intends to challenge the provisions of the Justices of the Peace Act dealing the making of complaints of judicial misconduct and the provisions of the JPRC Procedures Document dealing with the preparation of a Notice of Hearing. Further, the Applicant intends to question the constitutional validity of the provisions in the Justices of the Peace Act and the Justice of the Peace Review Council's Procedures Document addressing compensation for the cost of defending complaints.

The provisions of the Justices of the Peace Act clearly call for a "complaint" and require that a hearing panel "uphold or dismiss a "complaint". This express requirement in the Act is contradicted by the JPRC Procedures Document which authorizes the JPRC to retain Presenting Counsel who is given unfettered discretion to draft a Notice of Hearing. This unfettered discretion granted Presenting Counsel under this statutory scheme violates the security of tenure of the Applicant and indeed all justices of the peace. This unfettered discretion is avoided in the complaint process dealing with judges of the Ontario Court of Justice through section 7 of the Ontario Judicial Council Procedures Document at p.22 thereby protecting their security of tenure.

The provisions dealing with compensating the Applicant, and indeed all justices of the peace in Ontario, for legal costs incurred in defending judicial misconduct complaints violates the financial security component of judicial independence, unlawfully encroaches on the right to counsel and the right to make full answer in defence of one's judicial office, has the potential to place lawyers in a conflict of interest with their clients, has the potential to undermine the independence of the Bar and make lawyer's beholden to the Review Council or the executive branch and violates s.7 of the Canadian Charter of Rights and Freedoms since the statutory scheme contains no statutory language placing a legal obligation on the Attorney General to indemnify justices of the peace even if a recommendation for compensation is made by a hearing panel – statutory language which is found in the Courts of Justice Act dealing with Provincial Court Judges.

The question is to be argued on *Monday, March 6<sup>th</sup>, 2017 at 10 .A.M. or a date soon thereafter that is mutually convenient to the parties, at a place to be designated by the Justices of the Peace Review Council.*

**The following are the material facts giving rise to the constitutional question:**

1. There exists a conflict between the Justices of the Peace Act, R.S.O. 1990, sections 10.2(1),(2), 11(15), 11(19), 11.1(1), 11.1(10) and the JPRC Procedures Document authorizing Presenting Counsel to draft a Notice of Hearing with no oversight or review by the Complaints Committee which ordered the hearing.
2. This conflict between the Act and the Procedures Document provides Presenting Counsel retained by the JPRC with an unfettered discretion which can and did violate J.P. Massiah's security of tenure. The Applicant was removed from his judicial office not based on an upholding of a complaint in writing but based on the hearing panel's finding that allegations in Presenting Counsel's Notice of Hearing was made out on a balance of probabilities – a question which was not before the hearing panel for adjudication.
- 3 Both complaints committees and hearing panels may recommend that a justice of the peace be compensated for the costs of defending an investigation and or a hearing into their conduct under the following sections of the Justices of the Peace Act, R.S.O. 1990 c. J.4 s.11(16) and (17) and 11.1(17) and (18).
4. Relying on past practice and the Justices of the Peace Review Council's pronouncement in their Procedures Document of his right to counsel in order to defend allegations of judicial misconduct initiated against him by former Presenting Counsel, Mr. Doug Hunt, (The Hunt Allegations – Appendix A) and more serious allegations, asserting violations of the Human Rights Code and a prior history of judicial misconduct, raised in a Notice of Hearing dated May 31<sup>st</sup>, 2013(The Henein Allegations – Appendix B), JP Massiah retained two lawyers, namely, Ernest J. Guiste, an African-Canadian and Jeff House, a Euro-American-Canadian to represent him.
5. The proceedings before the hearing panel of the Justices of the Peace Review Council commenced in May, 2013 and ended in June, 2015 and involved a total of twenty-three days of hearings and extensive written submissions by both parties. The hearing panel itself raised a jurisdictional question which it invited the parties to make submissions on which ultimately resulted in the panel retaining Independent Counsel and obtaining an opinion. (Independent Counsel opinion – Appendix C)

6. After agreeing to Mr. Guiste's request that adjudication of the jurisdiction and abuse of process motions be held in abeyance in order to decide them on a full evidentiary record the Chair of the hearing panel stated to Mr. Guiste that this was a pyrrhic victory. A pyrrhic victory is a victory that inflicts such a devastating toll on the victor that it is tantamount to defeat. (Excerpt of June transcript – Appendix D)

7. The combined Bill of Costs for JP Massiah's defence of the allegations against him totaled roughly \$600,000 with roughly \$500,000 for the services of Ernest J. Guiste and roughly \$100,000 for the services of Jeff House.(Appendix E collectively) Ernest J. Guiste was on the case from start to finish and Jeff House joined him in May, 2014.

8. The hearing panel recommended to the Attorney General of Ontario that JP Massiah be removed from office and declined to make a recommendation for compensation of his costs associated with defending the complaint and the allegations raised against him in Presenting Counsel's Notice of Hearing. (Compensation Decision – Appendix F)

9. The day following release of the hearing panel's Compensation Decision the Chair of the hearing panel re-tweeted an article from the Toronto Sun proclaiming that tax-payers would not have to pay JP Massiah's legal fees and his lawyer has been referred to the Law Society of Upper Canada. This act created the impression in the minds of reasonable observers that the Chair of the Panel endorsed the Toronto Sun article and Presenting Counsel's submission that it is not whether counsel should be compensated but rather whether the public, rather than the client, should be required to "foot the bill". (Tor Sun Article and re-tweet from Deborah Livingstone @dresden girrl – Appendix G)

10. JP Massiah sought judicial review of the hearing panel's decisions on liability, penalty and compensation and JP Massiah once again incurred substantial legal fees in doing so. J.P. Massiah incurred legal fees of \$130,000 on the judicial review and leave to appeal motion. October 4<sup>th</sup>, 2016 the Divisional Court remitted that matter of compensation back to the original JPRC panel and proceeded to order costs against him personally notwithstanding his success on the compensation point. The Registrar of the JPRC has demanded payment of those costs forthwith payable to "The Ministry of Finance".

11. The Henein Allegations asserted violations of the Human Rights Code of Ontario, including the creation of a poisoned work environment and a prior history of judicial misconduct even though this set of allegations pre-dated or were contemporaneous to the first proceedings which Mr. Hunt was Presenting Counsel on. The first notice which J.P. Massiah received of these allegations was in the Notice of Hearing itself. These allegations did not arise from Mr. Hunt's complaint and as a result were not pre-screened and investigated by the complaints committee which investigated Mr. Hunt's complaint.

12. JP Massiah earned roughly \$120,000 annually as a Justice of the Peace.

13. The JPA and its Procedures Document fail to guarantee JP Massiah the financial security component of the constitutional right of judicial independence and the right to properly defend his office to the extent that what the JPA and its Procedures Document provides is an illusory right without any statutory language for enforcement as found in s.51.7 (8) of the Courts of Justice Act, R.S.O. 1990 c C.43. This lack of a statutory language for enforcement improperly empowers the hearing panel with an unfettered discretion to compensate or not compensate and even to interfere with the right of counsel to defend without fear of both financial and professional punishment and absent due process of law which is borne out by the Review Council's pattern and practice in dealing with this issue and was evident in the Applicant's case before Justice Vallencourt and here.

14. The problem with the JPA and its Procedures Document on the issue of the Applicant's and indeed all justices of the peace compensation for defending judicial misconduct proceedings under the JPA is that the legal proceedings initiated against JP Massiah have yet to conclude and both Mr. House and Mr. Guiste are duty bound by the best traditions of their profession not to abandon their client in the circumstances in which he was placed and the existing statutory scheme provides no enforcement mechanism that even if a recommendation for compensation were to be made that the Attorney General would be under any legal obligation to satisfy it. Counsel are being arbitrarily compelled to forego their fees or risk professional discipline.

15. The provisions of the JPA and its Procedures Document are therefore unconstitutional in that they violate the financial security component of J.P. Massiah and indeed all justices of the peace in Ontario's right to judicial independence, undermine and or compromise their right to counsel by creating an apparent conflict of interest, undermine and or compromise the independence of the bar by intentionally or unintentionally making lawyers who defend justices of the peace in Ontario de facto agents of the state subject to financial reward or financial and professional penalty and punishment at a hearing panel's unfettered discretion without regard to due process of law.

16. Indeed, in a prior proceeding involving J.P. Massiah before a JPRC hearing panel chaired by Justice Vallencourt J.P. Massiah's counsel were paid directly by a Government of Ontario cheque even though liability was clearly established against him.

**The following is the legal basis for the constitutional question:**

1. The position held by the Applicant as a Justice of the Peace is protected by the constitutional principle of Judicial Independence;
2. The Constitutional Principle of Judicial Independence provides the Applicant with security of tenure – a fact that is reflected in s.11.2 of the Act but is rendered moot or illusory by the unfettered discretion granted Presenting Counsel in drafting the Notice of Hearing and then aggressively defending the JPRC decision on judicial review, filing the record of proceedings pursuant to s.10 of the Judicial Review Procedures Act and now acting on the rehearing of the compensation issue remitted for re-hearing by the Divisional Court on or about October 4<sup>th</sup>, 2016.
3. The financial component of judicial independence guarantees judicial officer like the Applicant of financial security and this financial security includes the right to indemnification by the Attorney General for Ontario for defending his office – especially where the attack on the office stems not from the public per se but from Presenting Counsel who under the JPRC Procedures Document and established jurisprudence are required to be impartial and independent;
4. The Applicant was required to defend allegations in a Notice of Hearing prepared by counsel retained by the Review Council to present the case against him which Notice of Hearing raised allegations that he violated or acted contrary to the Human Rights Code and were not part of the complaint in writing filed with the Review Council against him.
5. The extra allegations advanced by Presenting Counsel’s Notice of Hearing received great publicity in the press and made the task of the Applicant defending his office significantly more onerous and arguably impaired the fairness of the entire proceedings.
6. The hearing panel itself sought the guidance of all counsel on determining and resolving their own questions on jurisdiction raised in July, 2013 and only resolved in July, 2014.
7. The hearing panel refused to make a recommendation to the Attorney General to pay for the cost of the Applicant to defend himself as requested by Presenting Counsel. The Divisional Court overturned that decision finding that it was based on a false premise that “it is only in exceptional circumstances that the public purse should bear the legal costs of a judicial officer who has engaged in judicial misconduct.

8. Both the Hunt Report and the Notice of Hearing dated May 31<sup>st</sup>, 2013 stem from office-holders created by the executive branch to independently advance complaints brought pursuant to s.10.2 and fall within a category analogous to those cited in paragraph 52 do the Divisional Court Decision dated October 4, 2016 in that they are clearly not complaints by citizens as all of the witnesses confirmed at the hearing but more accurately complaints by the government or the executive branch.

9. Hearing Panels under the JPA may recommend compensation but neither the JPA or the Procedures Document contain any statutory language requiring the Attorney General to make payment on a recommendation.

10. Justices of the Peace therefore unlike Provincial Court Judges do not have the benefit of a compulsory payment clause like s.51.7(8) of the Courts of Justice Act thereby depriving them of one of the objective conditions or guarantees mandated by the financial security provision of the constitutional principle of judicial independence, access to counsel and indemnification for the cost of defending their office.

**The following constitutional questions are raised:**

1. Does the unfettered discretion granted Presenting Counsel in the JPRC Procedures Document in drafting the Notice of Hearing violate judicial security of tenure for the Applicant and indeed all Justices of the Peace in Ontario ?

1a. Did this unfettered discretion violate the Applicant's right to security of tenure in this case to the extent that paragraphs 1-6 and 14 were neither made to the JPRC in writing nor were they investigated by a complaints committee ?

1b. Did the unfettered discretion violate the Applicant' security of tenure in this case to the extent that all of the remaining paragraphs in the Notice of Hearing arose from the investigation itself and not from a complaint in writing to the JPRC and accordingly were not investigated by a complaints committee ?

2. Does the financial security guarantee of the constitutional principle of judicial independence place a duty on the Attorney General for Ontario to ensure that justices of the peace like the Applicant have the right to reasonable access to counsel to defend judicial misconduct proceedings: 1. Generally; 2. Where complaints can be characterized as complaints from the executive branch or its agents – such as Presenting Counsel in the subject statutory forum as part of the sine qua non of the concept of The Rule of Law and the constitutional principle of judicial independence?

3. Assuming such a duty exists, what are the proper constitutional parameters to be placed on this duty ? For example, does this duty extend to the costs associated with corresponding applications in the courts flowing from the judicial misconduct proceedings – such as those ordered by the Divisional Court in the judicial review proceedings ?

4. Of what legal significance is it that the allegations in this case bare the following hallmarks and qualities:

1. The allegations are not from members of the public per se but stem from the office of two separate Presenting Counsel;
2. The allegations which are the subject of this application pre-dated or were contemporaneous to the allegations dealt with by the first Presenting Counsel;
3. The allegations which the Applicant was compelled to defend in the May 31<sup>st</sup>, 2013 Notice of Hearing raised issues of the Applicant's conduct being unwelcome, vexatious and creating a poisoned work environment under the Human Rights Code as well as an allegation of a prior record of discipline and a propensity to commit the allegation against him – none of which was part of the complaint filed under s.10.2 of the JPA;
4. The allegations in the Notice of Hearing related to allegations arising between 2007 and 2010 and were the subject of a hearing in 2014;
5. Particulars 1-6, 7(b), 7(c), 7(d), 7(e), 7(f), 8(a), 8(b), 8(c), 8(d), 10, and 14 were not made to the Review Council pursuant to s.10.2 of the JPA and were not screened and investigated by a Complaints Committee under s.11 of the JPA

6. The Justices of the Peace Review Council Procedures Document stipulates that the role of Presenting Counsel is not to seek a particular order, but rather to ensure the matter is evaluated fairly and dispassionately to the end of achieving a just result and Presenting Counsel abandoned this role in favor of a full-blown prosecution of the Applicant based on propensity evidence
  7. Although Presenting Counsel undertook not to introduce evidence of the finding of the First Proceeding as similar fact evidence this is exactly what was done. Presenting Counsel further abandoned impartiality and stepped into the role of prosecutor by accusing the applicant of being “untruthful” in his evidence and invited the panel to use credibility to justify removal from office and it did.
  8. The hearing panel’s decision to deny indemnification and to make a referral to the Law Society of Upper Canada was at the behest of Presenting Counsel and the hearing panel exhibited no independent analysis or judgement.
5. Does the absence of statutory language in the JPA similar to s.51.7(8) of the Courts of Justice Act, R.S.O c. C. 43 affirmatively requiring the Attorney General of Ontario to compensate justices of the peace like the Applicant where a recommendation for compensation is made violate the constitutional principle of judicial independence and more particularly the financial security component and or s.7 of the Canadian Charter of Rights and Freedoms ?
  6. Does the current statutory regime under the JPA and the corresponding Procedures Document have the potential to undermine a lawyer’s duty of loyalty to his client and or create a potential conflict of interest and thereby violate s.7 of the Charter by making or creating a financial incentive for lawyers to be agents of the Review Counsel or the executive branch ?
  7. Does the current statutory regime under the JPA and the corresponding Procedures Document have the potential to impair the independence of the bar by unduly circumscribing the lawyer’s obligations to fearlessly defend their client without fear of financial or professional punishment ?



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